them with the brick wall which will be built well within the plaintiffs' premises and will not, in any way, encroach into the defendants' Plaza as would have happened had the proposal to build the ATM in the earlier proceedings being carried out. To that extent, I consider that *res judicata* does not arise as the facts now relied upon by the plaintiffs and the relief sought are very different from those raised in the previous proceedings.

The defendants have also pleaded that once installed, the use of the ATM along the narrow corridor which is in common use by the other occupiers of the Plaza would hinder and obstruct the corridor and since this would adversly effect their rights under the sale agreement, they had the right to impose conditions under section 5.11 to safeguard their own interests. This may well be so but this right does not extend to withholding their consent to the installation of the ATM in the first place. This is even so as the area on which the ATM will be installed will in no way jut out into the defendants' area and however narrow the corridor may be, the fact still remains that the plaintiffs have an absolute right over it as it is within the sphere of their ownership. Strangely enough, this objection was never raised in the earlier proceedings and I doubt whether the payment of a yearly levy of $20,000 as rental would have lessened the annoyance or hindrance that would occur to the other users of the corridor.

For the very reason that the ATM is to be installed within their own premises and will not encroach into any part of the Plaza, I consider that the defendants have been most unreasonable in withholding their consent especially so when they are fully aware that as bankers, the plaintiffs require the ATM to provide the latest and a most necessary facility to their customers. On that finding, I had accordingly made a declaratory order in terms of the plaintiffs' prayers at (a), (b) and (d) of this originating summons.

Order accordingly.

Solicitors: *Shook Lin & Bok; G.T. Rajan & Co.*

RE C. ROSS-MUNRO Q.C.

[O.C.J. (Zakaria Yatim J.) April 7, 1986]

[Kuala Lumpur – Originating Motion No. C32-9-86]

Legal Profession – Queen's Counsel – Application for admission as advocate and solicitor of High Court, Malaya to appear for defendant in Supreme Court and High Court civil suits – Special qualifications or experience of applicant of a nature not available amongst advocates and solicitors in Malaysia – Whether applicant should be admitted – Legal Profession Act 1976, s. 18(1).

In this application, Colin Ross-Munro, a Queen's Counsel of wide experience in both civil and criminal cases, applied for admission as an advocate and solicitor of the High Court, Malaya, under section 18(1) of the Legal Profession Act 1976, to enable him to appear before the Supreme Court on behalf of one Lorrain Esme Osman as well as to appear in two civil suits Nos. 138 and 438 of 1985. The Bar Council, the Selangor and the Federal Territory Bar Committee did not object to the application which the Attorney-General opposed on the main ground that there were lawyers in the country who had special qualifications and experience to represent Lorrain Osman at those hearings. The question for consideration is whether the applicant possesses "special qualifications or experience of a nature not available amongst advocates and solicitors in Malaysia".

Held, allowing the application: (1) the issues that will be dealt with in the two civil suits are complex and important issues which require the services of a person with special qualifications and experience;

(2) the fact that a Queen's Counsel was admitted to appear before the Supreme Court earlier in respect of similar matter shows that the matter requires the services of a person with special qualifications and experience of a nature not available in Malaysia.

Case referred to:

(1) *American Cyanamid Co.* v. *Ethicon Ltd.* [1975] A.C. 396.

ORIGINATING MOTION.

J. Fernandez for the applicant.

Mohamed Rauf Nabi Box (Senior Federal Counsel) for the Attorney-General.

Ng Seng Geok for the Malaysian Bar Council, Selangor and Federal Territory Bar Committee.

L. H. Ng for the plaintiffs in the civil suits.

Zakaria Yatim J. (delivering oral judgment): This is an application by notice of motion for the admission of a Queen's Counsel, Mr. Colin Ross-Munro, as an advocate and solicitor of the High Court, Malaya under section 18(1) of the Legal Profession Act 1976. The application was made to enable him to appear before the Supreme Court on behalf of Lorrain Esme Osman as well as to appear in two civil suits No. 138 and 438 of 1985.

The representatives of the Bar Council, the Selangor Bar Committee as well as the Federal Territory Bar did not object to the application. Encik Mohamed Rauf, the representative of the Attorney-General, however, opposed the application. According to him, Mr. Ross-Munro should not be admitted as an advocate and solicitor to appear at the hearing in the Supreme Court as well as in two civil cases, Civil Suit Nos. C138 of 1985 and C438 of 1985. His main ground of objection was that there are lawyers in this country who have special qualifications and experience to represent Lorrain Osman at those hearings.

The question for the court to consider is whether Mr. Ross-Munro possesses "special qualifications or experience of a nature not available amongst advocates and solicitors in Malaysia." According to Mr. Sonni Pillai's affidavit in support of the motion, Mr. Ross-Munro has wide experience in both civil and criminal cases. He has dealt with matters relating to the construction of Acts of Parliament, the Convention of Human Rights and the Constitution of Bermuda. He has for many years specialized in private international law, and recently he appeared in two English cases relating to international stay of proceedings. The affidavit also listed a number of important cases in which Mr. Munro had appeared.

According to Sonni Pillai's affidavit, the issues to be considered before the Supreme Court are (1) whether Order 66 of the Rules of the High Court 1980 are invalid in that Parliament has not, at any material time, given itself the power to make Rules of the High Court which make provision for the obtaining of evidence in Malaysia for foreign courts in criminal proceedings; and (2) whether certain examinations of witnesses carried out pursuant to the order of the Chief Justice Malaya under Order 66 of the Rules of the High Court are invalid. Mr. Fernandez, counsel for the applicant, submitted that these issues involve complex points of law relating to constitutional law, private international law as well as public international law.

In the application for the admission of Mr. Clive Nicholls, Q.C., to represent the Attorney-General of Hong Kong at the hearing of an appeal in the Supreme Court, similar grounds were stated in the application. At the hearing of this application, the representative of the Attorney-General did not raise any objection. Harun J. allowed the application and admitted Mr. Nicholls to represent the Attorney-General of Hong Kong in the Supreme Court (see OMA32-2-86).

In my opinion, in the application before me, the issues referred to are complex in nature and the fact that a Queen's Counsel was admitted to appear before the Supreme Court earlier in respect of similar matter shows that the matter requires the services of a person with special qualifications and experience of a nature not available here. On these grounds, I allow the application for admission in respect of the hearing before the Supreme Court.

I shall now turn to the two High Court civil suits Nos. 138 and 438. According to Sonni Pillai's affidavit, there are likely to be complex issues of law in these two suits, namely: (1) the proper law to be applied to various agreements (2) the question relating to election and satisfaction and possibly estoppel, and (3) the complex questions relating to *forum convenience*. I think these issues too are complex in nature involving questions of law relating to company law as well as conflict of law.

Mr. Munro had appeared before the High Court in Kuala Lumpur in 1984, and when his application for admission was made, the issues that were to be dealt with at the hearing in the High Court were:

(a) whether an agreement to ensure that a shareholder would forego its statutory rights to petition for winding up under sections 181, 217 and 218 of the Companies Act 1965 is valid or whether it is void and/or unenforceable as being contrary to public policy;

(b) whether the plaintiffs in their writ of summons dated March 16, 1984 have as against Satiya any legal cause of action and/or any legal right that requires protection by the court;

(c) whether this is a case which should be decided on the principles of *American Cyanamid Co.* v. *Ethicon Ltd.*[1] or upon different principles, namely, as to whether in all the circumstances it is just or not to grant the injunction.

The Attorney-General did not raise any objection when that application was made then. It would appear, on the face of it, that the issues which I have just read are issues being dealt with every day in this court. However, the court admitted him in view of the complex nature of the case, and in view of the numerous documents involved. The issues that I have just mentioned in the earlier application and the issues that will be dealt with in the two

civil suits are complex and important issues which require the services of a person with special qualifications and experience. I think this is a proper case to admit Mr. Munro to appear in the two civil suits.

I order that the applicant be admitted to practise as an advocate and solicitor of the High Court in Malaya for purposes of a leading counsel for Lorrain and the application before the Supreme Court at Kuala Lumpur and in Civil Suit Nos. C138 and C438 of 1985 and in any interlocutory proceedings in respect thereof.

Order accordingly.

Solicitors: *Fernandez & Co.; Skrine & Co.*

VILLAGE HOLDINGS SDN. BHD. v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA

[O.C.J. (Shankar J.) January 7, 1987]

[Kuala Lumpur – Civil Suit No. C23-2838-86]

Civil Procedure – Writ issued against Queen in Right of Canada – Writ left with member of State of Canadian High Commission – Objection to service – Conditional appearance – Application to set aside writ and purported service thereof.

Diplomatic Immunity – Foreign sovereign, immunity of – Diplomatic and Consular Privileges Ordinance 1957, ss. 3 & 6 – Diplomatic Privileges (Vienna Convention) Act 1966 – Vienna Convention, Art. 31 – "Private" property – Civil Law Act 1956, s. 3.

International Law – Sovereign immunity – Foreign sovereign – Ownership of land in Malaysia.

Constitutional Law – Sovereign immunity – Federal Constitution, Arts. 32(1) & 181(2).

In this case, the plaintiff had entered into an agreement to purchase premises used as the residential accommodation of the diplomatic members of the Canadian High Commission. Her Majesty the Queen in Right of Canada, being the registered proprietor of the land, was named as vendor and the plaintiff as the purchaser. The agreement provided that in the event of non-completion by reason of the plaintiff's default, the defendant was entitled to forfeit the deposit and without prejudice to other remedies. Time was to be of the essence of the agreement. The plaintiff did not complete as provided in the agreement or at all. Extensions of time were requested and given but for a price. The defendant's solicitors eventually notified the plaintiff's solicitors that the agreement had been terminated and that all sums paid by the plaintiff under the agreement stood forfeited to the defendant. This amounted to $1,752,835.35. The plaintiff took out a writ against the defendant claiming, *inter alia*, (1) that the notice of termination of the agreement was in fact a wrongful repudiation of the agreement and (2) that the forfeiture of the total amount by the defendant under the said agreement was improper. An attempt to secure the writ at the Canadian High Commission was resisted but the writ was eventually left with a Malay female member of the staff of the High Commission. The High Commission protested immediately. The defendant filed conditional appearance and then applied for the writ and the purported service thereof to be set aside.

Held: the defendant is not subject to the jurisdiction of the court and the writ must be set aside.

Per Shankar J: (1) For myself, I do not consider the leaving of a writ with some unidentified member of an embassy staff is proper service (even if we are to assume that the person concerned was so employed) and that the entry into the premises was lawful. Nor have I been satisfied that the premises of the Canadian High Commission is outside the jurisdiction of this court. The expression jurisdiction here, to my mind, must mean the area of the territorial jurisdiction of the High Court.

(2) But the law is that substituted service can only be had in cases in which personal service could be had. As the courts have no jurisdiction over a foreign sovereign, the rule is that he cannot be served by substitution (*Mighell* v. *Sultan of Johore*[1]). See also in the case of a colonial government (*Sloman* v. *Government of New Zealand*[2]). Where there is sovereign immunity, service can only be effected if the sovereign ruler or government submits to the jurisdiction of this court. In the present case, there never was any submission. The purported service was not only factually ineffective but also in violation of a statute. On that ground alone, I am compelled to hold that there was no proper service as required by law or at all.

(4) Even if there was some prior contractual agreement to submit, such agreement is not permanently binding and the sovereign can subsequently refuse to be impleaded.

(5) The Diplomatic Privileges (Vienna Convention) Act 1966 ("the 1966 Act") has not diluted the immunity claimed by the defendant in the manner claimed by plaintiff's counsel or at all. To my mind, there is an important distinction to be drawn between the immunity accorded to a sovereign, and that accorded to a sovereign's diplomats. Under Part II of the Diplomatic and Consular Privileges Ordinance No. 53 of 1957 ("the 1957 Ordinance"), section 3 conferred total immunity from suit and legal process to the chief representative (in this case the Canadian High Commissioner) and the members of his official staff.

(6) It is the opinion of this court that this Article (Article 31 of the Schedule to the 1966 Act) does not assist the plaintiff for two reasons. First, the exception only applies to *private* immovable property. I hold this to mean that the property must be owned by some individual or corporation. Here, the property was owned by Her Majesty the Queen herself. Part V of the 1957 Ordinance is still good law and section 9 thereof expressly authorizes the ownership by a foreign sovereign of land in Malaysia for the purposes of the residence or offices of the chief representative of such country or his official staff. It is therefore not "private" property in the sense intended in Article 31.